

**TCEQ DOCKET NO. 2021-1000-MSW**

<b>APPLICATION BY</b>	§	<b>BEFORE THE</b>
	§	
<b>DIAMOND BACK RECYCLING</b>	§	
<b>AND SANITARY LANDFILL, LP</b>	§	<b>TEXAS COMMISSION ON</b>
	§	
<b>FOR TCEQ PERMIT NO. MSW-2404</b>	§	<b>ENVIRONMENTAL QUALITY</b>

**APPLICANT DIAMOND BACK RECYCLING AND SANITARY LANDFILL, LP'S  
RESPONSE TO HEARING REQUESTS**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Diamond Back Recycling and Sanitary Landfill, LP (“Applicant”) submits this response to the requests for a contested case hearing received by the Texas Commission on Environmental Quality (“TCEQ”) regarding its application for Permit No. MSW-2404 (“the Permit”) originally filed with the TCEQ on August 5, 2019. The Permit would authorize construction and operation of Diamond Back Solid Waste Facility & Recycling Center in central Ector County, Texas (“the Proposed Facility”). The proposed municipal solid waste (“MSW”) landfill will be operated in conjunction with an already registered and constructed recycling facility<sup>1</sup> on the same property (“the Property”) to provide safe, reliable MSW disposal capacity to support the recycling facility and for use by residents and businesses in Ector and surrounding counties. The Ector County government and the City of Odessa both support issuance of this permit and the proposed facility as “as an extremely beneficial addition”<sup>2</sup> to the community by providing an economically viable recycling facility and a legal alternative to the problem of illegal dumping in the area.

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<sup>1</sup> TCEQ Registration No. MSW-100494.

<sup>2</sup> Comment submitted September 15, 2020 by Mr. Rickey George, Director of Ector County’s Environmental Enforcement Unit.

The TCEQ's Executive Director has made a preliminary decision that the subject application satisfies all applicable statutory and regulatory requirements and that the Permit should be issued. Requests for a contested case hearing were received from three<sup>3</sup> persons.<sup>4</sup>

### **I. Request of Mr. Ashraf Salim**

Public comments and a hearing request were submitted by Mr. Ashraf Salim. The request states that Mr. Salim's company has plans to develop acreage "in very close proximity" to the Proposed Facility, and expresses the concern that issuance of the Permit would be "detrimental" to the success of his development. These issues were raised during the public comment period, and to Applicant's knowledge, they were not withdrawn by the commenter in writing. To the extent that Mr. Salim claims to be an affected person, Applicant disputes this claim as a question of fact and law. The issues raised in Mr. Salim's request are not within TCEQ's jurisdiction, and are therefore not relevant or material to the decision on the application.

Mr. Salim's request fails to establish that he is an affected person.<sup>5</sup> The request speaks of Mr. Salim's "intentions" to invest, and his "proposed business ideas." The TCEQ's jurisdiction does not extend to speculative impacts on property values or future investments. The interest claimed by Mr. Salim – the success of his claimed future property development – is not one protected by the law under which the application will be considered.<sup>6</sup> Furthermore, the request does not state any distance restrictions or other limitations imposed by law on Mr. Salim's claimed

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<sup>3</sup> A fourth entity, Aghorn Energy, Inc., submitted written withdrawal of its request on September 3 and 7, 2021.

<sup>4</sup> For purposes of this response, Knox Property Development, LLC and Jason Harrington are being counted as one requestor, as Jason Harrington, a principal with Knox Property, filed hearing requests individually based on his ownership of the same property allegedly owned by Knox Property, who separately submitted a hearing request through legal counsel.

<sup>5</sup> Affected person status is determined by consideration of all factors, including those listed at 30 Texas Administrative Code § 55.203(c).

<sup>6</sup> 30 TAC 55.203(c)(1).

property interest;<sup>7</sup> the request does not establish a reasonable relationship between the success of Mr. Salim's claimed future development and the issuance of the Permit;<sup>8</sup> and the request does not claim any likely impact of the Proposed Facility on Mr. Salim's health or safety<sup>9</sup> or on his use of any natural resource.<sup>10</sup>

Mr. Salim's request also fails to substantially comply with the applicable requirements for hearing requests.<sup>11</sup> Namely, the request fails to specify the location of Mr. Salim's claimed acreage, or its distance from the application site.<sup>12</sup> Neither Mr. Salim nor his company are adjacent landowners according to Ector County Appraisal District ("CAD") records.<sup>13</sup> Accordingly, Mr. Salim's request should not be granted and, since he does not have a justiciable interest, he should not be admitted as a party if there is a hearing.<sup>14</sup>

## **II. Requests of Moss Dean Ranch, et al.**

Public comments and two separate hearing requests<sup>15</sup> were submitted on behalf of Moss Dean Ranch, Betty Moss Dean, and C.A. & Betty Moss Dean FLP (collectively, "Moss Dean"). The requests state that the requestors own property "just west"<sup>16</sup> of the Proposed Facility. Moss Dean raised their issues during the public comment period, and to Applicant's knowledge, they were not withdrawn by the commenter in writing. To the extent that Moss Dean's requests raise general questions regarding the sufficiency of groundwater monitoring and protection, the

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<sup>7</sup> 30 TAC 55.203(c)(2).

<sup>8</sup> 30 TAC 55.203(c)(3).

<sup>9</sup> 30 TAC 55.203(c)(4).

<sup>10</sup> 30 TAC 55.203(c)(5).

<sup>11</sup> 30 TAC 55.201(d).

<sup>12</sup> 30 TAC 55.201(d)(2).

<sup>13</sup> See Application Part I, Appendix I.B.

<sup>14</sup> 30 TAC 80.109(a), in pertinent part, states: "To be admitted as a party, a person must have a justiciable interest in the matter being considered..."

<sup>15</sup> October 8, 2020 and January 14, 2020.

<sup>16</sup> Another request submitted on behalf of Moss Dean states that they own property "just east" of the Proposed Facility.

sufficiency of Applicant's characterization of the geology and hydrogeology of the site, and compatibility with existing land uses, Applicant disputes these as questions of fact. To the extent that Moss Dean's requests claim that they are an affected person with a justiciable interest not common to the general public, Applicant disputes this as a question of law.

Moss Dean's requests fail to substantially comply with the applicable requirements for hearing requests<sup>17</sup> and fail to establish that they are an affected person.<sup>18</sup> The requests do not identify the requestor's personal justiciable interest affected by the application, do not provide a written statement explaining the requestor's location and distance relative to the proposed facility, and do not state how they will be adversely affected by the proposed facility in a manner not common to members of the general public.<sup>19</sup>

Moss Dean's requests express concern based on claims that the Proposed Facility will potentially impact property values, the "accumulated wealth" of the community, and the potential for future development. None of these alleged issues are connected to Moss Dean's interests. Concerns for community wealth, property values, and future development are by definition common to the general public. Such concerns cannot establish a justiciable interest. Furthermore, these general concerns and questions do not constitute a list of relevant and material disputed issues of fact that establish the basis of the hearing request.<sup>20</sup>

Moss Dean's requests allege that the Proposed Facility is "not compatible with the active oil and gas activities in the area." Again, this assertion is an attempt to speak for the community at large, and it fails to establish how Moss Dean in particular will be adversely affected by the proposed facility. Moss Dean does not own any mineral interest beneath the Diamond Back

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<sup>17</sup> 30 TAC 55.201(d).

<sup>18</sup> 30 TAC 55.203(a).

<sup>19</sup> 30 TAC 55.201(d)(2).

<sup>20</sup> 30 TAC 55.201(d)(4)(B).

facility, nor do they hold any mineral lease interest anywhere on the subject property. In fact, the mineral lease operator on the Diamond Back property, Aghorn Energy, Inc., has withdrawn its hearing request in this matter. Whether the proposed Diamond Back facility is compatible with oil and gas activities is outside of the jurisdiction of the TCEQ, and more importantly, an alleged impact on the oil and gas activities in the general area does not equate to an individualized impact on Dean Moss.

Moss Dean's hearing requests also fail to provide other important information, or explain in plain language their specific location and distance relative to the Proposed Facility.<sup>21</sup> One of the requests simply states that the requestor owns property "just west" of the proposed facility; both of the requests fail to provide an address or daytime telephone number.

Moss Dean's hearing requests fail to substantially comply with the applicable requirements. More importantly, they fail to establish that Moss Dean are an affected person with a justiciable interest in this matter. Accordingly, Moss Dean's requests should not be granted, and they should not be admitted as a party if there is a hearing.

### **III. Requests of Knox Real Property Development, LLC**

Public comments and hearing requests were submitted on behalf of Knox Real Property Development, LLC ("Knox").<sup>22</sup> According to Ector CAD records, Knox owns property adjacent to the Site on the north side, and adjoining the Site to the east and south. Knox's hearing requests include a list of 20 issues they want considered in a contested case hearing. These issues were raised during the public comment period and, to Applicant's knowledge, have not been withdrawn in writing.

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<sup>21</sup> 30 TAC 55.201(d)(1)

<sup>22</sup> Comments and requests were submitted on behalf of Knox by its owner, Mr. Jason Harrington, and separately by its legal counsel, Mr. Eric Allmon.

Initially, Applicant notes that Knox requested a separate contested case hearing pursuant to the Texas Private Real Property Rights Preservation Act (“the Act”). Applicant disputes this issue as a question of law. This issue is related to property values, which are not within TCEQ’s jurisdiction, and are therefore not relevant or material to the decision on the application. The interests stated are not protected by the law under which the application will be considered, and are not properly the subject of the same contested case hearing as the one that decides whether the Permit will be granted. Applicant further notes that, contrary to Knox’s claims, the portion of the Act that it cites in its request does not establish any rights for adjacent landowners,<sup>23</sup> and the case law it cites to for this proposition does not appear to support their claim in any way.<sup>24</sup>

To the extent that Knox’s list of 20 issues relates to the sufficiency or adequacy of various aspects of the application, design, and proposed operation of the Proposed Facility, Applicant disputes these issues as questions of fact. These issues were each addressed by the Executive Director in the Response to Comments with specific references to the relevant portions of the subject application and the applicable regulations. Applicant stands ready to prove that each of these issues have been more than adequately addressed in the application in accordance with the applicable statutory and regulatory requirements.

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<sup>23</sup> Tex. Gov’t Code § 2007.002(5)(B) defines “Taking” as “a governmental action that: (i) affects an owner’s private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property...”

<sup>24</sup> *Stratta v. Roe*, 961 F.3d 340 (5th Cir. 2020) deals with a landowner who alleged that a groundwater conservation district applied its own rules unfairly, resulting in a taking of his property interest in subsurface water beneath his own land. The specific page cited by Knox contains a partial discussion of a factoring test to determine whether the district was an arm of the state government, a discussion of ripeness, and a partial discussion of a federal abstention doctrine; none of this is relevant to the instant case.

## **VI. Prayer**

For the foregoing reasons, Applicant respectfully requests that, should the Commission grant the hearing request of Knox, the following ordering provisions be included in its Interim Order:

1. The hearing request filed by Ashraf Salim be DENIED;
2. The hearing requests filed by Moss Dean Ranch, et al. be DENIED;
3. The hearing requests filed by Jason Harrington and Knox Property Development, LLC be consolidated and granted only as to Knox Property Development, LLC;
4. The hearing request filed by Knox Property Development, LLC pertaining to the Texas Private Real Property Rights Preservation Act be DENIED;
5. The issues referred to SOAH for a contested case hearing on the application be limited to the list of 20 issues contained in the Knox hearing request dated July 21, 2021, and all issues not being referred to SOAH be DENIED;
6. The contested case hearing on this matter be scheduled as soon as practicable; and,
7. The maximum duration of the contested case hearing be 180 days from the first day of the preliminary hearing to the date the proposal for decision is issued by SOAH.

**Respectfully submitted,**

***-S- Michael L. Woodward***

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**Attorneys for  
Diamond Back Recycling and Sanitary Landfill LP**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Diamond Back Recycling and Sanitary Landfill, LP's Response to Hearing Requests was filed via TCEQ's eFiling System and served on the following persons on this, the 13<sup>th</sup> day of September, 2021, by the methods listed below:

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***-S- Michael L. Woodward***

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